

United States District Court
Central District of California

BERNARD BUSH,

Plaintiff,

v.

VALASSIS COMMUNICATIONS, INC
(DBA VALASSIS),

Defendant.

Case No. 2:13-cv-08479-ODW(SSx)

**ORDER DENYING PLAINTIFF'S
MOTION TO REMAND [10]**

I. INTRODUCTION

On November 15, 2013, Valassis Communications, Inc. removed this state-law employment action to federal court based on diversity jurisdiction. Bernard Bush now moves to remand this matter to state court because Valassis Communications allegedly waived its removal right to by actively litigating in state court. Because the Court finds that November 1, 2013 was the date when Valassis could ascertain that the case was removable, the Court **DENIES** Bush's Motion to Remand.¹

¹ After carefully considering the papers filed with respect to this Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

II. FACTUAL BACKGROUND

On June 10, 2013, Bush filed suit against three defendants—Valassis Communications, Frank Patano and David Seago—in the Los Angeles Superior Court. (ECF No. 1, Ex A.) Defendant Valassis is a Delaware corporation and Defendants Patano and Seago are California citizens. (Rapoport Decl. ¶ 3.) Bush brought eight claims against all defendants: racial harassment and discrimination, wrongful termination, intentional and negligent infliction of emotional distress, retaliation for protesting racial harassment and discrimination, negligent supervision, and failure to prevent racial harassment. (ECF No. 1, Ex A.)

On October 18, 2013, the parties entered into a stipulation: Bush would voluntarily dismiss defendants Patano and Seago conditioned on both signing and executing releases that waived any rights to attorneys' fees and costs in connection with the claim. (Opp'n 3, Ex. C.) According to the stipulation, Bush intended to file the dismissal forms by October 25, 2013, and the First Amended Complaint by November 1, 2013. (Panuco Decl. Ex. 19.) On October 24, 2013, Judge Strobel granted the stipulation and entered an order that plaintiff would dismiss Patano and Seago by October 25, 2013. (Rapoport Decl. ¶ 3.)

Because of the scope of the written release agreements in dispute, the signed release agreements were not provided to Bush's Counsel until November 1, 2013. (*Id.* ¶ 4, Ex. A) Later the same day, Bush's counsel emailed defense counsel the dismissal forms for Patano and Seago. (*Id.* at 3–4) Bush's Motion to Compel—which was filed on September 20, 2013 and opposed by Valassis on October 21, 2013— was heard earlier that same day. (*Id.* ¶ 5.) On November 15, 2013, after Bush had dismissed the nondiverse defendants, Valassis filed its notice of removal. (*Id.* at 4)

III. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375

1 (1994). Federal courts have original jurisdiction where an action presents a federal
2 question under 28 U.S.C. § 1331, or diversity of citizenship under 28 U.S.C. § 1332.

3 A suit filed in state court may be removed to federal court if the federal court
4 would have had original jurisdiction over the suit. 28 U.S.C. § 1441(a). However,
5 courts strictly construe the removal statute against removal jurisdiction, and “federal
6 jurisdiction *must* be rejected if there is any doubt as to the right of removal in the first
7 instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added).
8 The party seeking removal bears the burden of establishing federal jurisdiction.
9 *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

10 Under 28 U.S.C. § 1446(b), a defendant must file a notice of removal within 30
11 days from the date he first objectively learns that an action is removable. A defendant
12 may learn that an action is removable in one of two ways: through the face of the
13 initial pleadings or through the receipt “of a copy of an amended pleading, motion,
14 order or other paper from which it may first be ascertained that the case is one which
15 is or has become removable.” 28 U.S.C. § 1446(b); *Harris v. Bankers Life & Cas.*
16 *Co.*, 425 F.3d 689, 692 (9th Cir. 2005). After one year, removal is not permissible
17 regardless of the source of information. *Roth v. CHA Hollywood Med. Ctr., L.P.*, 720
18 F.3d 1121, 1125 (9th Cir. 2013)

19 IV. DISCUSSION

20 Bush contends that Valassis’s removal of this action is improper because
21 Valassis waived its right of removal by actively litigating in state court after
22 removability was ascertainable. Valassis asserts that it did not actively litigate after
23 removability was ascertainable because it did not receive an “other paper” from which
24 it could ascertain removability until November 1, 2013. In the alternative, Valassis
25 argues that its actions did not constitute “active litigation,” evidencing intent to have
26 the entire matter resolved in state court. The Court considers each in turn.

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1 **A. Removability**

2 Bush alleges that the “other paper” from which Valassis could ascertain that the
3 case was removable was the signed October 18, 2013 stipulation to dismiss the
4 nondiverse defendants Patano and Seago. Bush suggests that because the stipulation
5 stated that Bush would dismiss all claims against Patano and Seago, it served as actual
6 notice that the case was removable. Bush argues that at the latest “[a]ny purported
7 uncertainty about whether Plaintiff actually intended to dismiss the nondiverse
8 defendants was resolved on October 24, 2013,” when the superior court granted the
9 stipulation. (Reply 3.) In contrast, Valassis contends that the correct “other paper”
10 from which removability was ascertainable was formal dismissal of Patano and Seago
11 filed on November 1, 2013, after Bush had received their signed releases. For the
12 reasons discussed below, the Court agrees with Valassis.

13 Under 28 U.S.C. § 1446(b), the “other paper” that starts the 30-day window for
14 removal must be one from which the defendant can “ascertain that the case is or has
15 become removable.” The “other paper” must indicate on its face that the case has
16 become removable—not that it one day may become removable. *Bosky v. Kroger*
17 *Tex., LP*, 288 F3d 208, 211 (5th Cir. 2002) (defining ascertain as “to make certain,
18 exact or precise; or ‘to find out or learn with certainty.’”). This rule promotes judicial
19 economy and avoids protective removals by defendants.

20 This action was not removable on October 18, 2013, because dismissal of the
21 nondiverse defendants was conditioned on Bush’s receipt of Patano and Seago’s
22 signed liability releases. And without the dismissal of these nondiverse defendants the
23 case would not be removable. While the stipulation stated that Patano and Seago
24 would be dismissed from the action on October 25, 2013, they were not actually
25 dismissed until November 1, 2013. Prior to that executed dismissal, no document
26 demonstrated that the case had become removable. *See, e.g., Mertan v. E.R. Squibb &*
27 *Sons, Inc.* 581 F.Supp. 751, 752–753 (C.D. Cal. 1980) (finding removal improper
28 where settlement reached orally in mid-trial but no formal dismissal had been

1 entered); *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991) (holding
2 that a voluntary dismissal not final until formally recorded on the docket).

3 The rule Bush urges us to adopt would needlessly inject uncertainty into a
4 court's inquiry as to whether removal is timely. Moreover, Ninth Circuit precedent
5 has expressly held that defendant's subjective knowledge of the relevant facts does not
6 affect the time for removal. *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 693
7 (9th Cir. 2005) (“(N)otice of removability under § 1446(b) is determined through
8 examination of the four corners of the applicable pleadings, not through subjective
9 knowledge or a duty to make further inquiry.”).

10 Bush urges that other cases have held the “other paper” from which
11 removability could be ascertained could take the form of a private settlement letter, a
12 deposition transcript and telephone notice. But in none of these cases was dismissal
13 of nondiverse defendants conditioned upon receipt of liability releases from those
14 nondiverse defendants. Accordingly, the Court finds that the “other paper” from
15 which removability could be ascertained was the formal dismissal of Patano and
16 Seago filed on November 1, 2013.

17 **B. Active litigation in state court**

18 Even where removal is proper, a defendant “may waive the right to removal
19 where, after it is apparent that the case is removable, the defendant takes action in
20 state court that manifests his or her intent to have the matter adjudicated there, and to
21 abandon his or her right to a federal forum.” *Resolution Trust Corp. v. Bayside*
22 *Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994). Because the Court finds that the
23 “other paper” from which removability could be ascertained was the formal dismissal
24 filed November 1, 2013, and Valassis did not take any action in state court after that
25 date, Bush's waiver argument fails.

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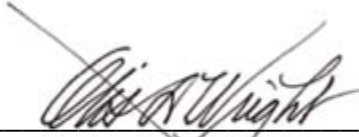
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1 **V. CONCLUSION**

2 For the reasons discussed above, the Court **DENIES** Bush's Motion to Remand.
3 (ECF No. 10.)

4 **IT IS SO ORDERED.**

5
6 February 7, 2014

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10 **OTIS D. WRIGHT, II**
11 **UNITED STATES DISTRICT JUDGE**
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